

No. 21088

In the

**United States Court of Appeals
For the Ninth Circuit**

ROBERT LEWIS BANZER,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

REPLY BRIEF OF APPELLANT

On Appeal from the United States District Court
for the District of Oregon

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COUNTER-ARGUMENT

We have considered the statement of the United States Attorney in Appellee's Brief, page 2, in which he quotes, "Appellant utilized the equipment to print a quantity of counterfeit blank checks of the Safeco Life Insurance Company located in Seattle." (R. 11-2, 60-61).

In referring to these references, we note that many checks were allegedly printed besides the checks that were entered into evidence as referred to in Appellee's Brief (Transcript of Testimony, Page 11)

Q. "Did he print anything else, any other matter?"

A. He printed some construction company checks and some Ford Motor Company checks, identification and driver's licenses."

(Transcript of Testimony, page 60)

Q. "Did you see him preparing these checks?

A. Yes.

Q. Would you please look at Government's Exhibit 2 through 7? I will ask if you can identify those.

A. I would say that these, in my opinion, are no checks that were being worked on. This one here looks a little different."

It, therefore, is reasonable to assume that the Grand Jury, in returning its Indictment under oath, described the offense presented to it based upon documents in its possession at that time.

QUESTIONS PRESENTED

The true inquiry, therefore, is not whether there is a variance in proof, but whether there has been such a variance as to "affect the substantive rights" of the accused.

The alterations in the Indictment by the Court and the United States Attorney amount to a substantive change, and would no longer be the Indictment of the Grand Jury which presented it.

It is the uniform ruling of the United States Courts, and it is the imperative requirement of the provisions of the Constitution, (Amendment V), which would be of little avail if an Indictment once found can be changed by the prosecuting officer with the consent of the Court to conform to their views of the necessity of the case.

We have no quarrel with (Krepper vs. United States) decided by the United States Attorney; in fact, the Krepper case reaffirms the law as established in Ex Parte Bain.

Had the Government attempted to introduce into evidence the exhibits that were introduced (Exhibits 2 through 7) without the Amendment of the Indictment, three of the exhibits would be objectionable as not being the same instruments as described in the Indictment. This being so, the Amendment amounts to a "variance" as to affect the "substantive rights" of the accused.

The general rule that allegations and proof must correspond is based on the objective requirements:

1) The accused shall be definitely informed as to the charges against him so that he may be enabled to present his defense and not be taken by surprise by the evidence offered at the trial; and

2) That he may be protected against another prosecution for the same offense.

Berger vs. United States, 259 U.S. 78, 83, 55 S. Ct. 629, 79 L. Ed. 13, 14

We have carefully read the Citation in the Hirabayashi case 320 U.S. 81 at page 85, and find no application in the ruling of the Hirabayashi case that applies to the case at bar. Had the three defective indictments been eliminated, certain of the documents introduced in evidence would have been objectionable as being evidence of other crimes.

CONCLUSION

The substantive rights of the Appellant accused have have been grossly affected by the amendment of the Indictment requested by the United States Attorney and Ordered by the Court, and the cause should be reversed and remanded and the conviction set aside and vacated.

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CERTIFICATE OF ATTORNEY

I certify that, in connection with the preparation of this brief, I have examined rules 18 and 19 of the United States Court of Appeals for the 9th Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Attorney for Appellant

